In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1994

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LENOX HILL HOSPITAL, A NEW YORK NOT-FOR PROFIT CORPORATION,

Petitioner,

-against-

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a/ FAME COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If this Court grants the writ of certiorari sought, the following question will be presented for review:

1. Was the New York Court of Appeals correct in determining as a matter of New York State law that L. 1984, ch. 940 failed to substantially advance a legitimate state interest, and in fact contravened the primary intent of New York City's Rent Stabilization Law (the statute it amended) by encouraging the eviction of long-term residential occupants?

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Nos. 94-1555
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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

This brief is submitted in opposition to the petitions for a writ of certiorari submitted on behalf of petitioner Lenox Hill Hospital ("Lenox Hill") and petitioner The State of New York (the "State").

The parties on whose behalf this brief is submitted are respondents Amir Manocherian *et al.* ("respondent"). The matter which is the subject of the petitions and this brief in opposition is *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385 (1994).

The petitions should be denied because the judgment appealed from is not final within the meaning of 28 U.S.C. § 1257(a). In addition, the judgment in question turns on a finding by the New York Court of Appeals that L. 1984, ch. 940 (hereinafter, "ch. 940") failed to substantially advance a legitimate state interest. The respondent respectfully submits that a determination by New York State's highest court regarding the nexus between the means and ends of a state statute is a unique state law determination to which, upon a negative finding, this Court should defer.

Finally, certiorari should be denied because the petitioners have failed to establish that the factual and legal issues involved herein merit the extraordinary relief sought.

JURISDICTION

The Judgment in Question is Not Final Under 28 U.S.C. § 1257(a)

The petitioners conclusorily allege that the Court has jurisdiction to review the judgment below under 28 U.S.C. § 1257(a). Petitioner Lenox Hill asserts, under authority of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the underlying "decision is final ... since the New York Court of Appeals has conclusively invalidated a state statute as violative of the Takings Clause of the United States Constitution and thereby finally deprived petitioner of its rights under the state law." Lenox Hill Pet., at pp. 1-2. In fact, *Cox* establishes that the judgment of New York Court of Appeals is not final, and that this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

The underlying action originally involved two separate complaints. The first complaint pertained to five of the six apartments at issue (R 114-36). The complaint alleged 14 causes of action, as follows:

Cause of Action	Relief Sought
First	Declaration of unconstitutionality regarding L. 1984, ch. 940.
Second	Declaration of non-primary residence against Lenox Hill.
Third through Seventh	Judgment of possession against each of the five apartments.

Eighth	Attorneys' fees and costs under 42 U.S.C. §1988.[1]
Ninth through Thirteenth	Use and occupancy for each of the five apartments.
Fourteenth	Attorneys' fees.

After issue was joined, the respondent moved for summary judgment on the first through seventh causes of action, or, in the alternative, for summary judgment on the first, second and sixth causes of action (R 31-32)[2]

The second complaint related solely to Apartment 3F (R 188-97). The complaint alleged five causes of action, as follows:

Cause of Action	Relief Sought
First	Declaration of unconstitutionality regarding L. 1984, ch. 940.
Second	Declaration of non-primary residence against Lenox Hill.
Third	Judgment of possession against Apartment 3F.
Fourth	Use and occupancy for Apartment 3F.
Fifth	Attorneys' fees.

After issue was joined as to the second complaint, the respondent moved for summary judgment on the first, second and third causes of action or, in the alternative,

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[1] Pursuant to a December, 1991 stipulation, the parties agreed that the Eighth cause of action, seeking a § 1988 award against the State, would be discontinued, without prejudice (R. 158-59).

[2] The sixth cause of action sought a judgment of possession with respect to Apartment 16G (R 126).

for summary judgment on the first and second causes of action (R 160-161).

The judgment of the New York Court of Appeals, by declaring ch. 940 to be unconstitutional, granted summary judgment to the respondent on the first cause of action in each complaint; all of the other issues remain undecided. The Court's October 20, 1994 judgment remitted the case "to Supreme Court, New York County, for further proceedings in accordance with the opinion herein." App. 44a.[3] More specifically, the final paragraph of the majority's order and decision stated:

> "Accordingly, the order of the Appellate Division should be reversed, with costs, and Chapter 940 of the Laws of 1984 declared unconstitutional and the case should be remitted to Supreme Court, New York County, for such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case."

App. 16a.

It is Lenox Hill's position herein (despite its claim of finality), and in the remitted proceeding, that the judgment of the New York Court of Appeals had little bearing on the underlying issue of which party is entitled to possession of the six disputed apartments. Lenox Hill asserts in its petition that ch. 940 was enacted solely "in an excess of caution," and that independent of that

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[3] The petitioners utilize different paginations in their respective appendices. Unless otherwise indicated, all references to the appendix shall refer to the pagination in the petition filed by petitioner Lenox Hill.

enactment "[a] long line of cases in New York had previously held that a corporation could lease rent-stabilized apartments for the use of their employees and obtain renewal leases." Lenox Hill Pet., at pp. 4-5. In short, Lenox Hill asserts that irrespective of the judgment herein, it can still prevail in the remitted proceeding on nonfederal grounds.

It is settled that a judgment will not be deemed final for purposes of 28 U.S.C. §1257(a) where, as here, "anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In *Cox*, the Court identified four exceptions to this rule. *Id.* at 477-83. Lenox Hill and the State, however, fail to identify which of the four exceptions allegedly applies to the instant case. What is apparent is that this case does not fall under any of the first three exceptions enumerated in *Cox*.

Only the fourth exception is arguably implicated herein. In *Cox*, the Court described the fourth exception as follows:

> "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant

> cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."

Id. at 482-83 (emphasis supplied).

Cases expanding upon the underscored language establish why the fourth exception does not apply to the instant case. Quite simply, the failure to review the judgment herein will not "seriously erode federal policy"; indeed, no "federal policy" is at issue. In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the Court observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* at 55. The Court held that a challenge to the constitutionality of the use of RICO statutes to criminalize patterns of obscenity offenses "calls into question the legitimacy of law enforcement practices of several States, as well as the Federal Government." *Id.* at 55-56. No First Amendment or law enforcement issues are implicated herein. Moreover, the rent stabilization statute at issue is wholly peculiar to New York State.

Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court held that the failure to review a decision of the Ohio Supreme Court relating to

workers' compensation "might seriously erode federal policy in the area of nuclear production," which policy enjoyed federal pre-emption status. *Id.* at 179. No such pre-emptive federal policy is at issue here.

More analogous to the instant case is *Flynt v. Ohio*, 551 U.S. 619 (1981), wherein the Court held that a judgment of the Ohio Supreme Court on the federal defense of selective enforcement did not implicate a "federal policy" for purposes of the fourth exception:

> "Here there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward. The question presented for review is whether on this record the decision to prosecute petitioners was selective or discriminatory in violation of the Equal Protection Clause. The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule."

Id. at 622.

Clearly, the federal government has no identifiable policy with respect to the Takings Clause. As such, this case does not fall within any of the *Cox* exceptions, and the judgment from which review is sought is not final pursuant to 28 U.S.C. §1257(a).

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 75a-83a of the petition filed by the State.

The respondent adds that the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived of "property ... without due process of law."

COUNTERSTATEMENT OF THE CASE

This case concerns the narrow issue of whether L. 1984, ch. 940 ("ch. 940"), an amendment to New York City's Rent Stabilization Law, substantially advances a legitimate state interest. The New York Court of Appeals, *inter alia,* having duly determined that the primary purpose of the Rent Stabilization Law was to protect the occupancy rights of long-term tenants, held that the enactment in question contravened the Rent Stabilization Law by encouraging evictions. Because ch. 940 did not substantially advance a legitimate state interest, the enactment was declared unconstitutional.

For a concise description of the underlying facts of the case up through the Appellate Division proceedings, including an analysis of the relevant statutes, the Court is respectfully referred to Section I of the Court of Appeals' October 20, 1994 order and opinion. App. 5a-7a.

The Court of Appeals, by 5-2 majority, declared ch. 940 to be unconstitutional. Applying the nexus test established in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court held that ch. 940 failed to substantially advance a legitimate state interest. The Court of Appeals had been applying the nexus test in similar challenges since 1989. See, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied sub nom. Wilkerson v. Seawall Assocs.*, 493 U.S. 976 (1989); *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied* _____U.S._____, 114 S.Ct. 2693 (1994).

The case turned on the Court of Appeals' interpretation of the underlying goals of the Rent

Stabilization Law, the statute ch. 940 purported to amend. The majority not only found that ch. 940 failed to substantially advance these goals, but in fact contravened them. Ch. 940 only protected Lenox Hill's tenancies if the apartment was occupied by an "affiliate" of the Hospital. This meant that if an affiliate left Lenox Hill's employ, *i.e.*, if the affiliate retired, changed professions or switched employers, Lenox Hill would have to evict the occupant in order to retain the apartment. The Court of Appeals stated:

> "Indeed, in significant respects, the particular statute contradicts two key goals of the RSL, to wit, occupant protection and eventual market redemption. These incongruities flow out of the transferral of power from a landlord to the employer of the actual occupants, and by the removal of the affected apartments entirely and permanently from marketplace availability or potentiality for other publicly interested or vying occupants at rent-stabilized rates.
>
> The preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation. Purporting to promote the general public welfare by enabling not-for-profit hospitals to continue to provide subsidized housing benefits to its chosen employees cannot sustain the sweep and manner of the burden and confiscation effected against the few owners. Dissenting Justice Joseph P.

Sullivan aptly framed the consequences as follows:

> 'A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage (196 A.D.2d 728, 732).'"

App. 10a.

The Court also held:

> "The central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim. It affects a tiny number of dwelling units. The effect of the statute is also quite ephemeral. These apartments were subject to rent stabilization prior to the enactment and will remain so, irrespective of the outcome of this long-standing dispute affecting a dwindling number of apartments, still in controversy in this litigation, with respect to the hospital's prime tenancy lease renewal entitlements. Accordingly, Chapter 940 fails to substantially or functionally prevent or relate to excessive rents and profiteering.

> The realistic appraisal of Chapter 940 shows that it was sought and designed essentially to subsidize the non-profit hospitals [sic] special fringe benefit to some of its special health care employees. This common employer-employee dilemma has no legally or legitimately cognizable, causal relationship to the governmental intrusion on rights and entitlements due owners in the use and enjoyment of their properties in a rental market where demand intractably exceeds supply at affordable levels. Chapter 940 is really interposed as a special housing program, privately funded through those owners who happen to have previously rented to not-for-profit hospitals, like Lenox Hill Hospital."

Id. at 11a-12a.

SUMMARY OF REASONS FOR DENYING THE WRITS

1. In the judgment in question, the New York Court of Appeals determined that ch. 940 did not substantially advance the primary goals of New York City's Rent Stabilization Law, the statute ch. 940 amended. A determination by New York State's highest court regarding the nexus between the means and ends of the Rent Stabilization Law and ch. 940 is a unique state law determination to which, upon a negative finding, this Court should defer. Moreover, the peculiarities of New York City's Rent Stabilization Law, as well as the unusual factual setting herein, make this case inappropriate for review.

2. The Court of Appeals properly invoked the nexus test in the instant case in full accord with well-established precedent. See, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Dolan v. City of Tigard*, ____U.S.____, 114 Ct. 2309 (1994).

3. The Court of Appeals properly considered -- and rejected -- Lenox Hill's claim that ch. 940 provided just compensation for the taking of respondent's property.

REASONS FOR DENYING THE WRITS

I

The Unique Nature of Both L. 1984, Ch. 940 and the Rent Stabilization Law Makes This Case Inappropriate for Review by This Court

In the judgment below, the New York Court of Appeals held that ch. 940, which purportedly amended the Rent Stabilization Law, failed to substantially advance a legitimate state interest. App. 7a-14a. In so holding, the Court of Appeals was required to (1) interpret the Rent Stabilization Law and determine its principal goals; (2) determine the practical and functional effect of ch. 940, and (3) determine whether ch. 940 substantially advanced those goals.

There are few laws more limited in application or peculiar than New York City's Rent Stabilization Law, which has been described as an "impenetrable thicket, confusing not only to lawyers but to laymen." *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 70 (1981), quoting *Matter of 89 Christopher v. Joy*, 35 N.Y.2d 213, 220 (1974). Even more limited and peculiar is ch. 940, which applies solely to not-for-profit hospitals which lease rent stabilized apartments in New York and then sublet them to their affiliates. As the Court of Appeals correctly observed below, ch. 940 was enacted at the request of petitioner Lenox Hill, who was its "primary and real beneficiary." App. 6a. Irrespective of its questionable genesis, ch. 940 reflects little more than the social, political and housing concerns of a particular locality.

The respondent respectfully submits that a determination by New York State's highest court regarding the nexus between the means and ends of a local statute is a unique state law determination to which, on a negative finding, this Court should defer. Certainly, the extraordinary jurisdiction of the Court should not be invoked to determine whether the Court of Appeals correctly determined the principal goals of the Rent Stabilization Law, or whether ch. 940 substantially advanced those goals. Because this case does not involve matters of national interest, and implicates no federal policy, certiorari should be denied.

II

The Court of Appeals Applied the Proper Standard

In the judgment below, the New York Court of Appeals declared ch. 940 unconstitutional because it failed to substantially advance a legitimate state interest. In so holding, the Court of Appeals invoked the "essential nexus" test utilized by this court *in Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, ____U.S.____, 114 S.Ct. 2309 (1994). App. 7a-14a.

The petitioners assert that the nexus test is inapplicable where the constitutionality of a statute of general application is challenged. Instead, the petitioners claim that the nexus test only applies where the state, in an individualized zoning determination, exacts an easement in exchange for granting a permit. On this basis, the petitioners argue that certiorari is required so that the Court can "clarify" the limits of *Nollan* and *Dolan*. State Pet., Point I; Lenox Hill Pet., Point II. For the reasons set forth below, such clarification is unnecessary.

There can be little question that the nexus test applies to the instant case, as the Court of Appeals expressly found. App. 9a-10a. Dispositive of this issue is *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, the petitioner challenged a statute of general application which, in effect, allowed a pre-existing rent regulated tenant to sell his or her statutory rights to an incoming tenant. The petitioner alleged that the transfer of wealth from the landowner to the tenant constituted a physical taking. The Court rejected this argument, but observed that the

nexus test would apply to a regulatory takings claim relating to a statute of general application. The Court stated:

> "petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See, *Nollan v. California Coastal Comm'n*, supra, at 834-85."

118 L.Ed.2d at 167 (emphasis in original).

The applicability of the nexus test to the instant case is also evident from *Nollan* itself. In *Nollan*, the Court cited *Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) as the genesis for the nexus test. 483 U.S. at 834. Both cases involved a challenge to a statute or ordinance of general application. Notably, the Court stated in *Agins* that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ...." 447 U.S. at 260 (emphasis supplied).

More to the point, the *Nollan* majority held that the nexus test was appropriate for all challenges under the Takings Clause, and rejected as inapplicable the minimal scrutiny, excessive deference standard utilized in equal protection and substantive due process claims:

> "Contrary to Justice Brennan's claim ... our opinions do not establish that

> these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State could rationally have decided that the measure adopted might achieve the State's objective'... [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical."

483 U.S. at 834-35, n. 3.

Dolan also rebuts the petitioners' argument that the nexus test is limited to individualized zoning determinations. *Dolan* further refined the *Nollan* nexus test by defining the required degree of connection between governmental ends and means. In settling on the "rough proportionality" test, the Court approvingly cited six state court decisions which had utilized this standard. 114 S.Ct. at 2319. Notably, five of those cases involved constitutional challenges to statutes or ordinances of general application. See, *Simpson v. North Platte*, 206

Neb. 240, 292 N.W.2d 297 (1980); *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *College Station v. Turtle Rock Corp.*, 608 S.W.2d 802 (Tex. 1984); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979).

The petitioners' arguments defy common sense as well as precedent. The petitioners concede that the nexus test applies where a landowner seeks a governmental benefit but is required to give an exaction as a *quid pro quo*. If this is true, then the nexus test must also apply where, as here, a condition is imposed by governmental fiat on a hapless owner who has sought nothing in return.

The petitioners' claims regarding the proper standard for deciding this case are moot because the Court of Appeals determined that ch. 940 actually defeated the primary goals of the Rent Stabilization Law. Thus, ch. 940 cannot possibly satisfy whatever toothless "rationality" standard the petitioners would prefer. Where an enactment contravenes a legitimate state interest, even minimal scrutiny will be sufficient to justify a declaration of unconstitutionality.

Lenox Hill attempts to shoehorn its petition into Rule 10.1(b) by claiming that there is a conflict among state and federal courts as to whether the nexus test can be applied in cases involving a statute of general application. Lenox Hill Pet., at p. 17. The "conflict," however, is more apparent than real. *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994) concerned the constitutionality of a tax, and did not implicate the Takings Clause. *Id.* at 18. In *Parking Association of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), the

Supreme Court of Georgia, citing *Dolan*, ultimately concluded that "the city demonstrated 'rough proportionality' between the requirements and objectives of the ordinance." Id. at 766, n. 3. In *Carson Harbor Village Ltd., v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), the Court mentioned *Nollan* and *Dolan* in passing, primarily in the context of standing. Id. at 476-77.

In Point III of its brief, Lenox Hill invokes the infamous *Lochner* doctrine, claiming that the Court of Appeals improperly second guessed the Legislature's judgment relating to the wisdom of ch. 940. In fact, the Court of Appeals did nothing more than exercise its proper judicial function of determining whether a statute had violated the Takings Clause.

Stripped of its rhetoric, Lenox Hill's primary complaint is that it disagrees with the Court of Appeals' assessment of the underlying goals of New York City's Rent Stabilization Law, and its ultimate conclusion that ch. 940 contravened those goals. Lenox Hill's proposed remedy for the alleged *Lochner* violation is to have this Court second guess the New York Court of Appeals as to the proper interpretation of the Rent Stabilization Law. As noted earlier, a determination by New York State's highest court regarding the nexus between the means and ends of a New York statute is a unique state law determination to which, upon a negative finding, this Court should defer.

In Point I of its brief, Lenox Hill apparently asserts that no regulatory taking could have occurred in the instant case unless ch. 940 resulted in a physical taking of the respondent's property, or adversely impacted on the respondent's investment-backed expectations. In fact, as *Nollan* and *Dolan* establish, a regulatory taking will occur where a regulation fails to substantially

advance a legitimate state interest, or denies an owner economically viable use of its property. Notably, this Court found a regulatory taking in *Hodel v. Irving*, 481 U.S. 704 (1987), despite labelling as "dubious" the landowners' claim that the regulation in question had diminished their investment-backed expectations. *Id.* at 715.

Lenox Hill apparently asserts that as long as a regulation can be classified as "economic" in nature, the government's ability to regulate land is virtually unrestricted. This argument, however, was expressly rejected in *Dolan*:

> "Justice Stevens' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are 'a species of business regulation that heretofore warranted a strong presumption of constitutional validity.' *Post*, at 2325. But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenges on the ground that it violates a provision of the Bill of Rights.
>
> * * *
>
> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."

114 S.Ct. at 2320.

One last point should be made. In two prior post-*Nollan* cases, the New York Court of Appeals has applied the nexus test to constitutional challenges of a statute or regulation of general application. See, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989) and *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993). In both instances, this Court refused to grant certiorari relief. *Wilkerson v. Seawall Assocs.*, 493 U.S. 976 (1989); *Rent Stabilization Ass'n v. Higgins*, _____U.S._____, 114 S.Ct. 2693 (1994).

III

The Court of Appeals Considered -- and Rejected -- Lenox Hill's Claim That Ch. 940 Provided Just Compensation

In Point IV of its petition, Lenox Hill asserts that the Court of Appeals erred as a matter of law by failing to determine whether ch. 940 provided the respondent with just compensation. Lenox Hill then asserts that certiorari is required to determine "[w]hether a statute can be invalidated as a regulatory taking without consideration of the just compensation issue." Lenox Hill Pet., at p. 24. Petitioner the State raises no similar claim.

Lenox Hill's contrived argument should be rejected out of hand. Lenox Hill concedes that it "asserted below that even assuming *arguendo* that Chapter 940 constituted a sufficient impairment of the landlord's interest to warrant consideration of the just compensation issue ... the legislation nevertheless afforded the landlord just compensation." Id. at pp. 23-24. The fact that the Court of Appeals considered this argument, and rejected it *sub silentio,* is not a basis for granting certiorari. It was not incumbent upon the Court of Appeals to explicitly reject every claim made by Lenox Hill below.

The Court of Appeals remitted the case for "such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case." App. 16a. Among the issues to be decided is the just compensation due the respondent. In this respect, State court proceedings have already commenced. See, *Manocherian et al. v. State of New York,* Ct. of Claims, Claim No. 91018.

CONCLUSION

For all of the foregoing reasons, the petitions for a writ of certiorari should be denied.

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Respectfully submitted,

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